that a contract by words of present import but not in the presence of a magistrate or minister, although followed by cohabitation, was no marriage. As the rules regulating marriage are the subject of state and not federal legislation, the conflict of laws though provoked abroad may eventuate in confusion worse confounded at home.

A case recently decided in England, *Re Goodman's Trusts*, 43 Law T. Rep. (N. S.) p. 14, may, perhaps, operate as a timely warning. It was there held that a child, illegitimate according to English law, but who was legitimate according to the laws of its domicile and of its parent's domicile, cannot take under the Statute of Distributions as one of the next of kin of an intestate dying domiciled in England. The word "children" in the Statute of Distributions means children according to the English law.

HUGH WEIGHTMAN.

New York.

Supreme Court of Pennsylvania.

IRA CRAWFORD *v.* JOHN SCOVEL.

A grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution.

It is not necessary as a condition precedent that there should be an offer to put the grantee *in statu quo*, for the ground upon which the deed of an insane man is held voidable is not only his incapacity to make a valid sale, but also his incapacity prudently to manage and dispose of the proceeds of the sale.

Whether the grantee upon disaffirmance by the grantor, can recover back the consideration paid, will depend on the circumstances and equities of the case.

To enable a man to avoid a deed made by him while insane, he may sue in his own name and not by a committee, and he may prove insanity on the same terms as if he were defendant in the action, and plaintiff were supporting his case with the same deed. If at the trial he should appear insane, the court will treat him and his cause as it would any other plaintiff suffering under a like malady.

EJECTMENT. At the trial, plaintiff having proved title in himself defendant put in evidence a deed from plaintiff to him and rested. Plaintiff then offered to prove that he was insane at the time he signed the deed, that defendant knew of his insanity, and that the bargain was unconscionable and unfair. Objected to, as introducing a defence inadmissible against plaintiff's deed, viz., the defence of insanity; also, because the offer was not full enough, in that before plaintiff can avoid the deed he must prove that he has offered to restore to defendant what he paid for the property. Objection sustained. Exception.

Verdict for defendant by direction of the court, and judgment thereon; whereupon plaintiff took this writ, assigning for error the action of the court in excluding the evidence aforesaid.

Sittser and *Harding*, for plaintiff in error.—The principle advanced by Littleton and Coke, that a man shall not be heard to stultify himself, has been properly exploded as being manifestly absurd and against natural justice: 2 Kent's Com. 451; *Warden* v. *Eichbaum*, 14 Penn. St. 121; *Bensell* v. *Chancellor*, 5 Whart. 371; *Cook* v. *Parker*, 4 Phila. 265. The court, in rejecting our offer to show insanity at the time of signing the deed with notice of the insanity to defendant, swept away our offer to show that the deed was procured by fraud.

W. E. & C. A. Little and *W. M. Piatt & Sons*, for defendant in error.—None of plaintiff's authorities go to the extreme length of allowing a recovered lunatic in a legal action of ejectment to destroy his own indenture. It should be by bill in equity, wherein defendant would have notice of the facts and claims against him, and time in which to prepare his evidence. The committee must be joined as plaintiff: *Uberoth* v. *Bank*, 9 Phila. 83. Otherwise who would vouch that the lunatic will not afterwards disaffirm his disaffirmance? As to the offer to show fraud, it is insufficient, in that it stands unconnected with an offer to prove a tender to restore to defendant his purchase-money: *Pearsoll* v. *Chapin*, 44 Penn. St. 9; *Morrow* v. *Rees*, 69 Id. 368.

The opinion of the court was delivered by

TRUNKEY, J.—As the case comes it presents these questions: 1. Can a plaintiff, who brings suit by himself, prove his insanity to defeat his deed given in evidence by the defendant? 2. Can he prove that the defendant knew of the insanity when he took the deed? 3. May he show the deed was procured by fraud? and, 4. Must he restore the consideration before bringing suit?

It is a general rule that a grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution: *Bensell* v. *Chancellor*, 5 Whart. 371; 2 Kent's Com. 451; *Gibson* v. *Soper*, 6 Gray 279. Like the deed of an infant, a lunatic's deed may be ratified and confirmed. Where there is no evidence of ratification after restoration to reason, it is impossible upon legal principles that the estate passed to the grantee in the deed. An insane person is incapable of making a valid deed, for he wants the consenting mind. "The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound

mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On the other hand, it intends that he who deals with infants or insane persons shall do it at his peril; nor is there practically any hardship in this, for men of sound minds seldom unwittingly enter into contracts with infants or insane persons:" *Gibson* v. *Soper*, *supra*. In *Molton* v. *Camroux*, 2 Exch. 487, an action to recover money paid for annuities, it was held, that, when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and *bona fide*, and which is executed and completed, and said property has been paid for and enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him. Like doctrine prevailed in *Beals* v. *See*, 10 Penn. St. 56. The decision in *Lancaster County National Bank* v. *Moore*, 78 Penn. St. 407, rests on the same principle; there was neither fraud nor knowledge of the insanity. Without inconsistency, in *Moore* v. *Hershey*, 7 Weekly Notes (Phila) 478, it was ruled that it is competent, in an action by an endorsee of a note made by a lunatic, for the lunatic to defend, either by showing that the endorsee had knowledge of the lunacy, or that the note was originally obtained fraudulently or without proper consideration. PAXSON, J., said: "I know of no case in which it has been held that a lunatic, when sued upon his contract, may not show want of consideration." After speaking of the rule which had been urged in favor of the plaintiff, he adds: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to the case of commercial paper made by madmen." In *Elliot* v. *Ince*, 7 DeG., M. & G. 475, 487, it is said that *Molton* v. *Camroux* was called a decision of necessity, and it is suggested that the same principle might apply to sales of land or mortgages. But in this country that rule is not universally extended to sales of personalty, and is not applied to conveyances of real estate. However, on that principle, or the one in *Bensell* v. *Chancellor*, the offered testimony was admissible for the purpose of avoiding the deed.

The defendant urged that the plaintiff did not propose to show he had recovered his reason, and, upon the truth of his offer, the

law presumes he continues insane; wherefore he cannot maintain the action and allege his insanity. Under the general issue in assumpsit, the defendant may show in avoidance of the contract that he was insane at the making of it. If he continues a lunatic, he may not appear and plead by attorney, and if it so appears on examination, the plea by attorney may, before judgment, be treated as a nullity and a guardian be appointed, who will be entitled to plead *de novo: Mitchell* v. *Kingman*, 5 Pick. 431. So when a plaintiff is met by a deed, good on its face, he may avoid it by proof that he was insane when it was executed. If his reason has been restored he has no other means of protection. A committee cannot be appointed for a sane man because he was at one time a lunatic. He must bring suit himself to recover his rights, and may prove insanity to avoid a deed set up against him on the same terms as if he were defendant in the action, and the plaintiff were supporting his case with the same deed. The principle contended for by the defendant would deprive a man, who had been *non compos mentis*, of remedy for recovery of his property, without fault on his part, and might work his utter ruin. If, at the trial, he should appear to be insane, the court would treat him and his cause as it would any other plaintiff suffering under like malady.

2. From the foregoing, it is manifest, that it is competent to prove the defendant had knowledge of the insanity when he took the deed. If unnecessary for its avoidance, it may be material on the question of restoration of the consideration. He who knowingly deals with a madman takes the risk of losing.

3. For like reason it may be proved that the deed was procured by fraud. Even the holder of negotiable paper may fail to recover because the maker was insane, when, but for that, there could be no defence to his action on the ground of fraud or want of proper consideration. Proof that the bargain was unfair and unconscionable would be pertinent in determining the equitable claims of the defendant.

4. The consideration need not be restored before commencement of the action, nor after, in all cases. To say that an insane man before he can avoid a voidable deed must put the grantor *in statu quo*, would oftentimes be to say his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. One of the obvious grounds on which

the deed of an insane man is held voidable is, not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity, which made the deed void, may have wasted the price, and made the restoration of the consideration impossible: *Gibson* v. *Soper*, *supra*. In that case the defendant contended there could be no recovery, because restitution had not been offered; and thereupon the plaintiff proposed, if anything was due, to make such restoration and repayment in such way and manner as the court should direct. The question was, as it is here, whether restoration is a condition precedent to recovery, and not whether under any circumstances a grantee after avoidance of the deed may recover back a part or the whole of the price paid? It is said, that, if the grantor having been restored to sound mind still retains and uses the consideration of the deed without offer to restore, or seeks to enforce the securities or avail himself of the contract which constituted such consideration, such conduct may furnish satisfactory and, it may be, conclusive evidence of a ratification. That would be an entirely different case from one where the grantor wasted the price he received before his reason was restored. Although the deed has has not been ratified, and consequently the plaintiff is entitled to recover the land, should it appear that in equity the whole or a part of the consideration ought to be restored or repaid, under the practice in this state, there would be no difficulty in doing justice between the parties by a conditional verdict and judgment.

Judgment reversed, and *venire facias de novo* awarded.

The most interesting point in the principal case is, that an insane person can avoid his deed without first tendering the consideration, or paying back the benefits his estate may have received from the purchase.

The learned judge cites with approval *Beals* v. *See*, 10 Barr 56; *Lancaster Bank* v. *Moore*, 28 P. F. Smith 407, and *Moore* v. *Hershey*, 7 Weekly Notes of Cases (Phila.) 478, all of which cases turned upon the fact of knowledge of the insanity, or want of good faith on the part of the opposite party, and yet, in deciding that the consideration need not be restored before bringing suit, if at all, quote largely from *Gibson* v. *Soper*, 6 Gray 281, a case which certainly is not law. The language is perhaps a little unguarded, but all that the court seem to have meant is, that where fraud had been practised on the lunatic, or the grantee knew of his infirmity, then, in such case, the consideration need not be restored at all; but that even in other cases the restitution or offer to restore the grantee to the *status quo* is *not a condition precedent to the action*, but that the equities may be adjusted after suit brought.

The rule as laid down in every case on the subject, except *Gibson* v. *Soper*, is, that where the opposite party acted without knowledge of the insanity of

the grantor, in good faith, and for a valuable consideration, the deed *cannot* be rescinded without placing the parties *in statu quo*, and, if that cannot be done, neither the lunatic, his committee, nor his heirs can avoid it at all, but the deed must stand.

In *Gibson* v. *Soper*, 6 Gray (Mass.) 281 (1856, THOMAS, J.), the court says: "This is a writ of entry brought for the demandant by his probate guardian to recover a farm. * * * The tenant claimed title under a deed of the demandant. * * * The demandant replied that at the time of the making and delivery of the deed, he was an insane man. * * * The position taken by the tenant is, that the grantor, or his guardian, or heirs, cannot avoid the grant unless he or they place the grantee, in all respects in the condition in which he was before the deed. It seems to us, upon careful consideration, that such is not the rule of law; that the restitution of the consideration of the deed, or purchase-money is not a condition precedent to the recovery of the land. * * * The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. * * * If the law required restitution of the price, as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly; and the great purpose of the law in avoiding such contracts, the protection of those who cannot protect themselves, defeated. The insane grantor could not avoid the deed of his estate, because the same folly which induced the sale, had wasted the proceeds; the result against which it is the policy of the law to guard." There was no evidence of bad faith or knowledge of the infirmity on part of grantee, the court evidently not considering that good faith, &c., made any difference in a contract with an insane person.

Now, the case of *Gibson* v. *Soper*, *supra*, stands alone, as every case bearing upon the particular point in question, is given below, and all arrive at an entirely different conclusion, supporting the rule given above.

In *Fitzgerald* v. *Reed*, 9 S. & M. 94 Miss. (1847,) the court (CLAYTON, J.,) says: "This is a bill to rescind a contract upon the ground of mental incapacity of the complainant. * * * * In rescinding the contract, however, the courts ought to place the parties in the situation they respectively occupied before it was entered into, or nearly as practicable, whatever benefit the lunatic or his estate may have received in consequence of his contract must be given up."

So also in *Carr* v. *Holliday*, 5 Ired. Eq. (N. C.) 167, (1847), the court (NASH, J.,) says: "The bill seeks to rescind certain contracts entered into between the intestate, Robert Carr, and the defendant. (A reference had been made to a master to determine what benefit the lunatic's estate had received.) "The master reports that the plaintiff cannot make restoration to the defendant of any property so purchased by him; that the contracts were made in good faith, without any knowledge of Robert Carr * * * the court will not deprive him (the defendant) of the advantages he has obtained without restoring to him whatever benefit the estate of the lunatic has received in consequence of the contract. This we are informed cannot be done. The bill must be dismissed with costs."

So in *Eaton* v. *Eaton*, 8 Vroom (37 N. J.) 108, (1874). In this case one of the parties claimed title to the land in dispute by virtue of a deed made to him by his father (deceased). It was attacked on the ground of insanity on the part of the grantor at the time of making the grant. The court (SCUDDER, J.), commenting on *Gibson* v. *Soper*, *supra*,

say, "This is good law where there is fraud practised upon one who is known at the time to be insane, but it is not the law where the purchase and conveyance are made in good faith, for a good consideration, and without knowledge of the insanity; not only must the consideration be returned in such cases before the conveyance will be avoided, but courts of equity and courts of law have gone further, and held that where persons apparently of sound mind, and not known to be otherwise, enter into a contract which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in *statu quo*, such contract cannot be set aside either by the alleged lunatic or those who represent him."

So again in *Scanlan* v. *Cobb*, 17 Am. Law Reg. (N. S.) 305; s. c. 85 Ill. 297. In this case Thomas Cobb, guardian of Mrs. Fanny Hendricks, a lunatic, filed his bill in the court below, praying for a decree setting aside a deed executed by his ward to Scanlan for a lot of ground, * * * on the ground that she was insane at the time. The answer made was, that Scanlan was a purchaser in good faith for full value, without any notice that Mrs. Hendricks was insane. The court below set the deed aside, ordering Scanlan to account for the rents, &c. Scanlan appealed. The court (SCHOLFIELD, J.), delivering the opinion, say, * * * "The evidence is clear that Scanlan had no personal knowledge that Mrs. Hendricks was insane. He negotiated with Van Wormer, who was acting under a power of attorney, * * * and Van Wormer not only failed to coummunicate to Scanlan that Mrs. Hendricks was insane, but he persists that she was perfectly sane, both when she executed the power of attorney to him and when she acknowledged the deed to Scanlan. Scanlan having acted in good faith, and without culpable negligence, is, upon the clearest principle of justice and morality, entitled, at all events, to be reimbursed that which he has paid, and which Mrs. Hendricks has had the benefit of. There is no more reason, in good morals, why a lunatic should not pay his or her debts, lawfully contracted, or those which are clearly and unquestionably contracted for a lunatic, than why a sane person should not; and it is equitable and right that a person paying such debts for the lunatic, under an honest belief that he was legally obligated so to do, although it turns out he was mistaken as to the obligation resting upon him, should be reimbursed. * * * The English doctrine, and that recognised generally by the courts in this country, is, where a purchase from an insane person is made, and a conveyance obtained in good faith, for a sufficient consideration and without knowledge of the insanity, the consideration must be returned before the conveyance will be avoided. And the courts have gone further, and held, that where persons apparently of sound mind, and not known by the adverse party to be otherwise, enters into a contract which is fair and *bona fide*, and which is executed and completed, and the property which is the subject of the contract cannot be restored so as to put the parties *in statu quo*, such contracts cannot be set aside, either by the alleged lunatic or those who represent him."

To the same effect, are *Young* v. *Stevens*, 48 N. H. 133 (1868); *Loomis* v. *Spencer*, 2 Paige (N. Y.) 153 (1830); *Sprague* v. *Duel*, 11 Id. 480; *Mohr* v. *Tulip*, 40 Wis. 66 (1876); *Nichol* v. *Thomas*, 53 Ind. 42; *Niel* v. *Morley*, 9 Vesey, Jr., 478 (1804); *Beavan* v. *McDonnell*, 9 Exch. 309.

See also, as to contracts being binding on lunatics, if made in good faith and without knowledge of the insanity: *Molton* v. *Camroux*, 2 Exch. 487; *Price* v. *Berrington*, 15 Jurist 999; *La Rue* v. *Gilkyson*, 4 Barr 375; *Beals* v. *Lee*, 10 Id. 56; *Lancaster Bank* v. *Moore*, 28

P. F. Smith 407; *Moore* v. *Hershey*, 7 Weekly Notes of Cases (Phila.) 478. As to contracts of lunatics being void, or voidable, &c., see *Scanlan* v. *Cobb*, 17 Am. L. Reg. 305 (note); also most of above cases.

GEO. W. REED.

United States Circuit Court, District of New Jersey.

IN RE THE SCHOONER ELIZA B. EMORY AND WEEKS, MASTER.

The majority in interest of the owners of a vessel have the absolute right to remove the master, whether he be a part owner or not, and to resume possession of such vessel at their own pleasure.

As against one who is master merely, this power may be exercised without cause and in violation of the contract engaging him.

In the case of a part owner, only a written agreement, entitling such part owner to possession, under sect. 4250 of the Revised Statutes, can defeat the exercise of such right.

A contract for the sale of a "sailing right" by the part owner of a vessel is not susceptible of specific enforcement, either by way of estoppel or by a direct proceeding for that purpose.

The only remedy for a breach of such contract, if any, is an action for damages.

APPEAL by libellants from the decree of the District Court in admiralty. The decree of the court below is reported in 19 Am. Law Reg., N. S., 571.

Henry Flanders and *S. H. Grey*, for libellants.

J. Warren Coulston and *H. R. Edmunds*, for claimants.

MCKENNAN, C. J.—The libellants represent the majority in interest of the owners of the schooner Eliza B. Emory, and have brought this suit to obtain possession of the vessel. It is not denied that, under ordinary circumstances, this right will be enforced against the minority interest in a vessel in favor of the majority, but it is contended that John B. Clayton, whose interest must be united with that of the other libellants to make up a majority of the proprietary shares of the vessel, is estopped from asserting his right as owner, and that therefore a majority of the owners is not represented in the libel.

John B. Clayton was one of the original owners of the Eliza B. Emory, and sailed her for some time as master. In April 1873, Clayton sold to Weeks, the respondent, one-sixteenth, for $1750, as a "sailing right of the vessel," and executed a bill of sale in the